

Maine Law Review

Volume 53 | Number 1

Article 18

January 2001

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Recommended Citation

Clay Calvery, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, 53 Me. L. Rev. 53 (2001).

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WHERE THE RIGHT WENT WRONG IN *SOUTHWORTH*: UNDERESTIMATING THE POWER OF THE MARKETPLACE

Clay Calvert

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WHERE THE RIGHT WENT WRONG IN SOUTHWORTH: UNDERESTIMATING THE POWER OF THE MARKETPLACE

Clay Calvert*

I. INTRODUCTION

When the United States Supreme Court unanimously declared in March 2000 that mandatory student activity fees at public universities do not offend the First Amendment¹ if distributed in viewpoint-neutral fashion,² the decision dealt a severe blow to the conservative movement that had both supported the challenge to fee assessments³ and long railed against a perceived leftist/liberal bias⁴ in higher education.⁵ *The New York Times*, acknowledging the political implications of the

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1. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses are applied to state and local governments through the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. See *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000).

3. At least seventy percent of the nation's 1,921 public colleges and universities use mandatory fees to finance student organizations. See Richard Willing & Mary Beth Marklein, *Supreme Court Unanimously Upholds Required Student Fees*, USA TODAY, Mar. 23, 2000, at 4A. See generally UPAC: University Park Allocation Committee (visited May 1, 2000) <<http://www.clubs.psu.edu/UPAC>> (describing the distribution and purpose of funds collected from the mandatory student activity fees at the Pennsylvania State University's main campus in University Park).

4. See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 85 (1996) (contending that modern liberalism has "captured significant institutions, most notably the universities").

5. The case was brought by Scott Southworth, a self-described "conservative Christian" law student at the University of Wisconsin. David G. Savage, *Supreme Court to Examine 'Fee Speech' at University*, L. A. TIMES, Nov. 1, 1999, home ed., at A1. The case, in turn, was partially funded by the Alliance Defense Fund, a not-for-profit, Arizona-based group founded in 1994 by leaders of several Christian groups. Mary Beth Marklein, *Hot Issues: Fees, Affirmative Action*, USA TODAY, Feb. 23, 1999, at 6D. This organization describes its mission on its home page on the World Wide Web as providing "the resources that will keep the door open for the spread of the Gospel through the legal defense and advocacy of religious freedom, family values, and the sanctity of human life." Alliance Defense Fund *Our Mission* (visited Apr. 5, 2000) <<http://www.alliancedefensefund.org>>. The organization hand-picked Jordan Lorence of the Northstar Legal Center—all of Lorence's cases reportedly have been funded by the Alliance Defense Fund—to represent Southworth. See Marcia Coyle, *How the Christian Right Came to Fund a Free Speech Case*, NAT'L L. J., Nov. 1, 1999, at A7. Friend of the court briefs were filed in support of Southworth by several conservative organizations that frequently are active in legal disputes, including the Virginia-based Rutherford Institute and the Sacramento, California-headquartered Pacific Legal Foundation. See Brief of Amicus Curiae of the Rutherford Institute, *Board of Regents v. Southworth*, 120 S. Ct. 1356 (2000) (No. 98-1189); Brief of Amicus Curiae of Pacific Legal Foundation, *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000) (No. 98-1189).

case, hailed the Court's decision in *Board of Regents v. Southworth*⁶ as "a surprisingly broad and decisive victory for universities on an ideologically charged issue that has roiled higher education."⁷

The decision, however, should have been anything *but* surprising to Scott Southworth and his right-wing benefactors. This Article argues that conservative legal advocates either seriously underestimated, or simply failed to appreciate, the sheer power of the marketplace of ideas metaphor in First Amendment jurisprudence⁸ and its inextricable connection to academe. The marketplace of ideas, it is asserted here, provides the pivotal premise for nearly all judicial decisions affecting freedom of speech on the nation's college campuses.⁹ The backers of Scott Southworth failed, in turn, to realize that the Court will—quite predictably—support measures that facilitate and enhance the academic marketplace of ideas in even-handed fashion.

The line of logic that leads to the conclusion that the Court's decision in *Southworth* was relatively easy to forecast actually is quite simple and worth spelling out here. There are four basic steps in that chain of logic.

The first step is the recognition that the Supreme Court's language in prior opinions adhered to the view that the public university, ideally and almost uniquely, is a marketplace for the unfettered exchange and challenge of ideas for all those who gain admission.¹⁰

The second step—one, ironically, based on the Court's decisions *in favor* of Christian religious organizations in the past—is the recognition that the Court *will* require equality of access for admitted students to programs that facilitate and enhance access, be it physical or fiscal,¹¹ to the academic marketplace of ideas.¹²

The third step is the recognition that because a major goal of the public university is indeed to serve as a diverse marketplace of ideas, measures that *thwart* diversity in the marketplace will be viewed unfavorably. Conversely, programs that *advance* the quantity and range of speech will be viewed favorably. Thus, to

6. 120 S. Ct. 1346 (2000).

7. Linda Greenhouse, *No Student Veto for Campus Fees*, N.Y. TIMES, Mar. 23, 2000, at A1.

8. The marketplace of ideas "is perhaps the most powerful metaphor in the free speech tradition." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992).

9. See *infra* notes 63-92 and accompanying text.

10. See *Healy v. James*, 408 U.S. 169, 180 (1972) (providing that "the college classroom with its surrounding environs is peculiarly 'the marketplace of ideas'").

11. The Court has held that a public university that makes its facilities generally available to student groups cannot deprive religious student organizations of access to those facilities for meetings. See *Widmar v. Vincent*, 454 U.S. 263, 277 (1981). More recently, the Court held that a religious organization could not be deprived of financial support to pay for its newspaper using money collected from a public university's fee assessment program. See *Rosenberger v. University of Virginia*, 515 U.S. 819, 845-46 (1995).

12. There is, of course, a substantial limitation of access to the academic marketplace of ideas that occurs in the admissions process. Some applicants are denied admission and, concomitantly, never receive permission to partake in the academic marketplace of ideas. This Article, in Part IV, discusses the potential for enhancing the diversity of ideas and thoughts in the academic marketplace via programs that facilitate entrance of some minority groups by altering admissions standards. See *infra* notes 188-92 and accompanying text.

the same extent that university speech codes¹³—a favorite and frequent target of right-wing conservatives¹⁴—are struck down routinely because they allegedly hinder “uninhibited, robust, and wide-open”¹⁵ discussion in the marketplace of ideas,¹⁶ mandatory fee assessments that financially support a wide range of viewpoints, like those at the University of Wisconsin, must be upheld because they enhance the diversity of ideas in the metaphorical speech market that is higher education.

Perhaps it was simply greedy self-interest on the part of the conservative right that blinded it from recognizing this third step. When the right thought that its own views were being squelched out of the university marketplace by speech codes and a perceived political correctness movement on campus,¹⁷ it attacked and won.¹⁸ But when the right arguably sought to squelch the voices and views of the left that were allegedly funded by fee assessments,¹⁹ it attacked and lost.²⁰ One can argue that the right was adopting a policy of “free speech for me, but not for thee,” as Nat Hentoff once titled a book.²¹ The right, in other words, wanted its voice to be

13. Campus speech codes “set limits of acceptable discourse for academic life” and “are backed by serious penalties like suspension and expulsion for gross or repeat violations.” KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 71 (1995). See generally Cass R. Sunstein, *Academic Freedom and the Law: Liberalism, Speech Codes, and Related Problems*, in *THE FUTURE OF ACADEMIC FREEDOM* 93 (Louis Menand ed., 1996) (describing speech codes and their relationship to academic freedom).

14. Opposition to the regulation of hate speech has come largely, although not exclusively, “from many on the political right.” Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 *FORDHAM L. REV.* 971, 974 (1995); see also Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 *ARIZ. L. REV.* 439, 441 (1995) (observing that opposition to hate speech regulation “has come largely from the political right”).

Donald Kennedy, former President of Stanford University, observes that conservative critiques of academia often allege that the phenomena of political correctness, sometimes associated with speech codes, has stifled conservative opinions on campus. DONALD KENNEDY, *ACADEMIC DUTY* 93 (1997).

15. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

16. See *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182-84 (6th Cir. 1995) (holding unconstitutional a Central Michigan University discriminatory harassment policy on the grounds of overbreadth and vagueness); *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (holding unconstitutional the University of Wisconsin’s policy and guidelines on racist and discriminatory conduct on the grounds of overbreadth and vagueness); *Doe v. University of Michigan*, 721 F. Supp. 852, 861-67 (E.D. Mich. 1989) (enjoining the University of Michigan from enforcing that part of its policy on discriminatory harassment by students that restricted verbal behavior and verbal conduct on the grounds of overbreadth and vagueness).

17. The so-called political correctness movement on college campuses and the related rise of speech codes have threatened “to undermine the central mission of the university. The result is a chilling of expression across campuses.” ROBERT D. RICHARDS, *FREEDOM’S VOICE: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT* 4-5 (1998).

18. See cases cited *supra* note 16, citing cases in which speech codes were held to violate the First Amendment protection of free speech.

19. Scott Southworth claims that “all the money goes to left-wing groups here.” David G. Savage, *Paying for Free Speech*, A.B.A. J., May 2000, at 30.

20. See Peter Schmidt, *Supreme Court Showdown Over Student Speech*, *CHRON. HIGHER EDUC.*, Nov. 12, 1999, at A31-A32 (writing that Scott Southworth and his fellow plaintiffs “stand accused by student activists of suing to advance a broader political agenda: the squelching of liberal and leftist speech on campus”).

21. NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1992).

heard above the silence imposed by speech codes, but it did not want the left's views to be heard above the silence that might be imposed by a lack of general student funding.²² The right, however, cannot have it both ways—it cannot win support for its own speech while not supporting the speech of others—because promotion of diversity of opinions in the university marketplace is privileged.

The fourth and final step is the recognition that entrance and access to the university marketplace of ideas is *not* free—it is limited by entrance requirements and admissions policies, as well as by physical classroom and dormitory space capacities. There are, in other words, a finite number of students that can be served at any one public university. Thus gaining entrance to the academic marketplace is not free but restricted. Just as the broadcast marketplace is limited by spectrum scarcity issues, and there are more people who want to broadcast than there are frequencies available,²³ so too is the academic marketplace limited. More students seek entrance to any given public university than there are seats, dorm rooms, and professors available to accommodate them.

It is precisely these restrictions on entrance to both the broadcast and university marketplaces that help to justify government efforts to enhance fairness *within* those respective marketplaces, as they both operate to serve the general public.²⁴ To increase fairness within the broadcast marketplace so that many views are heard, the Federal Communication Commission (FCC) employs the personal attack and political editorial rules.²⁵ To increase fairness within the university marketplace such that many views are heard, universities employ mandatory fee assessments.

If the broadcast industry can be held to a “quasi-fiduciary standard that require[s] it to approximate a fair marketplace of ideas”²⁶ because broadcasters are “trustees of the nation’s airwaves,”²⁷ then public universities, functioning as the trustees of the nation’s future leaders, may also take steps that help to approximate a fair, albeit unfree, marketplace of ideas.

The bottom line, then, is that the entire decision in *Southworth* can be interpreted through a basic understanding of one principle—the privileged and well-ensconced position of the marketplace of ideas in both First Amendment jurisprudence and, in particular, academia. The marketplace metaphor, in fact, was at the heart of the right’s great on-campus speech victories in the 1980s and 1990s. Conservatives largely won the judicial battle against speech codes because those policies, arguably, stifle the marketplace of ideas on campus by chilling speech. Like-

22. Cf. Joan Biskupic, *Justices Uphold Campus Fees: Support of ‘Dialogue’ Cited*, WASH. POST, Mar. 23, 2000, at A02 (attributing to Matthew Coles of the American Civil Liberties Union the assertion that gay and lesbian student groups “have been particularly targeted by students opposed to paying [mandatory fee assessments]”).

23. See KENNETH C. CREECH, *ELECTRONIC MEDIA LAW AND REGULATION* 75 (2d ed. 1996) (explaining that spectrum scarcity refers to the “finite number of broadcast channels available”).

24. See *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 877 (D.C. Cir. 1999) (observing that it was “the scarcity of broadcast spectrum relative to interested users” that justified adoption by the FCC of two rules that ostensibly promoted fairness within the broadcast marketplace, namely the political editorial and personal attack rules).

25. See *id.*

26. Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 501 (1999).

27. *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d at 883 n.9 (quoting the Joint Statement of FCC Commissioners Ness and Tristani, *Public Notice*, 13 F.C.C.R. 21,901 (June 22, 1998)).

wise, they won battles to secure access for religious student groups to both university facilities and funds based on the grounds that universities cannot discriminate against religious viewpoints in the marketplace of ideas, regardless of the Establishment Clause's implicit separation of church and state.²⁸ The marketplace thus provided the solid foundation upon which the conservative right's on-campus speech victories were built.

In *Southworth*, however, the religious right strangely did battle *against* the concept of the marketplace of ideas when it challenged a program designed to put more speech into the extracurricular academic marketplace. Rather than taking on the *Southworth* case, the right should have stopped while it was ahead in fighting perceived speech injustices on college campuses. With the right failing to appreciate the overwhelming power of the marketplace metaphor, the Court—ironically packed with appointees from conservative administrations²⁹—was able to hand a unanimous victory to one of the most liberal public universities in the country.

The ultimate irony, however, may be that Scott Southworth's brief to the United States Supreme Court actually cites *favorably* the marketplace of ideas metaphor.³⁰ Yet Southworth's attorneys argued that prior Court decisions *against* compelled funding of speech trumped the University of Wisconsin's goal of enhancing speech in the academic marketplace through mandatory fee assessments.³¹ What Southworth's attorneys failed to grasp is that public universities, *unlike* bar associations and teachers' unions with their private self-interested viewpoints,³² are unique government-operated marketplaces of ideas designed to promote both the public interest and a search for the truth.³³ In particular, they are marketplaces calculated to serve the general public—even those members of the public who may not be admitted to the academic marketplace in the first place—through the generation of informed, enlightened, and productive members of society. As marketplaces unto themselves, universities also train citizens to participate in the "real

28. The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Establishment Clause has been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* *Everson v. Board of Educ.*, 330 U.S. 1 (1947). In *Everson*, the Court observed that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18.

29. Chief Justice William Rehnquist and Associate Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and David Souter were each appointed by Republican presidents.

30. *See* Brief for Respondents at 25-26, *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000) (No. 98-1189).

31. *See id.* at 15-16, 26-27.

32. *Southworth* cited cases in which the Supreme Court struck down compulsory union dues and state bar fees for violating the First Amendment. *See id.* at 15-16 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar*, 496 U.S. 1 (1990)).

33. These twin goals of serving the public interest and mounting a quest for truth can be found in university mission statements. For instance, the mission of the University of Wisconsin, codified by a state statute and in accord with the primary goal of the marketplace of ideas, is "the search for the truth." WIS. STAT. § 36.01 (1999). That state universities are designed to serve the public interest at large—not simply the interests of the attending students—is clear in the Pennsylvania State University's mission statement, which provides in relevant part that Penn State "improves the lives of people in Pennsylvania, the Nation, and the world." Furthermore, as a Morrill Land Grant Act university, Penn State holds "a unique responsibility for outreach and public service to support the citizens of Pennsylvania." THE PENNSYLVANIA STATE UNIVERSITY, 1998-2000 BACCALAUREATE DEGREE PROGRAMS BULLETIN 13 (1998).

world" marketplace of ideas when they leave the academic one. Although it may be true, as Harvard Professor Frederick Schauer recently observed, that "American free speech doctrine has never been comfortable distinguishing among institutions,"³⁴ in *Southworth* it was clear that institutions of higher education *are* distinct from bar associations and unions. This distinction hinges on their unique characteristics as government-operated forums in which knowledge—perhaps even the truth—is generated, tested, and debated, and in which the public interest in producing educated members of society is paramount and stimulated through "the whole universe of speech and ideas."³⁵

Just as the government may constitutionally take affirmative steps to enhance another unique public-interest speech market—the broadcast medium³⁶—it is therefore not surprising that it may do the same in the realm of public education and the university marketplace of ideas.³⁷ Indeed, in upholding the Fairness Doctrine as a marketplace-enhancing measure in the domain of broadcasting, the United States Supreme Court observed over thirty years ago that the measure was compatible with the "First Amendment goal of *producing an informed public capable of conducting its own affairs*."³⁸ The emphasized language is crucial because it represents quite precisely what might be considered the major goal of public universities today—producing informed citizens capable of conducting the country's affairs.

This Article, however, does *not* laud uncritically the marketplace of ideas metaphor as it is applied by the Court to public universities and, more particularly, to mandatory fee assessments that support student organizations. Indeed, the university may not only be a severely flawed marketplace of ideas today, but it may be comprised of several different and distinct marketplaces—*curricular* and *extra-curricular* marketplaces—that serve very different functions.

Part II of this Article introduces the concept of the marketplace of ideas, analyzing its strengths and weaknesses, along with its roots in First Amendment jurisprudence and higher education.³⁹ Part III then describes and analyzes the *Southworth* case, including the reasoning of the United States Supreme Court in its decision to uphold viewpoint-neutral, mandatory, student fee assessments.⁴⁰ Next, Part IV elaborates on the link between the marketplace of ideas described in Part II

34. Frederick Schauer, *Principles, Institutions and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998).

35. Board of Regents v. Southworth, 120 S. Ct. 1346, 1355 (2000).

36. Broadcasters, unlike the owners of print media, are regulated by the Federal Communications Commission and are required to serve the public interest, convenience, and necessity. See 47 U.S.C. § 309(a) (1999) (providing that when granting licenses to broadcasters, the FCC is mandated to consider "whether the public interest, convenience, and necessity will be served by the granting of such application"); see also JEREMY HARRIS LIPSCHULTZ, FREE EXPRESSION IN THE AGE OF THE INTERNET 60-62 (2000) (discussing the public interest standard).

37. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (upholding the Fairness Doctrine and declaring that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee" (emphasis added)).

38. *Id.* at 392 (emphasis added).

39. See *infra* notes 43-112 and accompanying text.

40. See *infra* notes 113-74 and accompanying text.

and the *Southworth* decision discussed in Part III.⁴¹ It suggests that the case privileges the idea of tolerance within the marketplace of ideas. It also offers alternative versions and visions of the academic marketplace that might have affected the Court's reasoning and, perhaps, the outcome in the case. In brief, Part IV contends that *within universities* there are, in fact, distinct marketplaces of ideas that may *not* always merit heightened First Amendment protection, based on whether their functions are central or tangential to the core mission of public universities. This Part also connects the concept of the marketplace of ideas and the practice of mandatory fee assessments with the hotly contested issue of affirmative action in higher education.

Finally, the Article concludes that *Southworth* signals the willingness of the United States Supreme Court to continue its embrace of the public university as a marketplace of ideas and, perhaps more importantly from the perspective of educators such as the Author of this Article, its desire to promote that academic marketplace—however flawed and imperfect it may be—through affirmative, viewpoint-neutral programs that enhance the educational opportunities of all university students.⁴²

II. OF SPEECH MARKETS, ACADEMIC AND OTHERWISE

United States Supreme Court Justice Oliver Wendell Holmes Jr. introduced the marketplace of ideas rationale for protecting speech to First Amendment jurisprudence over eighty years ago.⁴³ Dissenting in *Abrams v. United States*,⁴⁴ one of the Court's earliest attempts to define the scope of free expression, Holmes wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.⁴⁵

Today, the economic-based⁴⁶ marketplace metaphor “consistently dominates the Supreme Court’s discussion of freedom of speech.”⁴⁷ Although it often is

41. See *infra* notes 175-92 and accompanying text.

42. See *infra* notes 193-97 and accompanying text.

43. See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 237 (1991) (writing that Holmes “introduced” the marketplace of ideas into First Amendment jurisprudence).

44. 250 U.S. 616 (1919).

45. *Id.* at 630 (Holmes, J., dissenting). Holmes’s dissent in *Abrams* “marked . . . a transformation in First Amendment jurisprudence.” Joseph A. Russomanno, “*The Firebrand of My Youth*”: Holmes, Emerson and Freedom of Expression, 5 COMM. L. & POL’Y 33, 34 (2000). In particular, it marked a more expansive and libertarian interpretation of the First Amendment. *Id.* at 40, 45; see also LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 18 (1986) (observing that “within the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech”).

46. See Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 542 (1998) (observing that the marketplace metaphor “suggests a hands-off approach to speech regulation [because] [e]conomic marketplace forces, not legislators, should guide and control the distribution of messages”).

47. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (1989); see also W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a rather recent review of the Court’s use of the marketplace metaphor).

criticized by academics,⁴⁸ Professor Martin Redish observes that "over the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which contrasting ideas compete for acceptance among a consuming public."⁴⁹ The premise of this idealistically free and fair competition of ideas is that truth will be discovered or, at the very least, conceptions of the truth will be tested and challenged.⁵⁰

Although Justice Holmes introduced the metaphor into First Amendment jurisprudence, the theory has "its roots in John Milton and John Stuart Mill."⁵¹ It was Milton, more than 350 years ago in the *Areopagitica*,⁵² who penned the now-often quoted⁵³ lines:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the Field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew truth put to the worse in a free and open encounter?⁵⁴

John Stuart Mill, in his 1859 essay *On Liberty*,⁵⁵ would later extend Milton's work and the marketplace of ideas metaphor to protect all political opinions.⁵⁶ Like Milton, he too "employed the quest for truth as the expressed keystone of his plea for liberty of thought and discussion."⁵⁷ Justice Holmes's previously quoted dissent in *Abrams* would, as Professor Leon Carnovsky wrote, show how strongly he was influenced by both Milton and Mill, and it would constitute "the greatest utterance on intellectual freedom by an American and ranking with the *Areopagitica* and the essay *On Liberty*."⁵⁸

Attacks on the marketplace metaphor, however, are far from uncommon today. They stretch from questions about the very assumption that truth is a goal worth searching for⁵⁹ to the more customary, yet still-vital, critique that access to the marketplace of ideas is skewed in favor of those who have the most economic resources. As legal scholars Robert Jensen and Elvia Arriola write from a critical

48. See generally Robert Jensen, *First Amendment Potluck*, 3 COMM. L. & POL'Y 563, 573-76 (1998) (setting forth various critiques of the marketplace of ideas metaphor).

49. Martin H. Redish & Kirk J. Kaludis, Symposium, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083 (1999).

50. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 753 (1997). The theory is attacked by some scholars, however, as "unpersuasive as an account of the search for social and political truth." Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1352 (1998).

51. POWE, *supra* note 43, at 237.

52. For a brief but enlightening background on, and analysis of, Milton's *Areopagitica* as it relates to free speech by one of the nation's leading First Amendment experts, see Vincent Blasi, *John Milton's Areopagitica and the Modern First Amendment*, COMM. LAW., Winter 1996, at 1.

53. Milton's words, for instance, are quoted at the start of the first chapter of several scholarly books—both old and new—on the First Amendment. See SMOLLA, *supra* note 8, at 3; ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 3 (1954).

54. JOHN MILTON, AREOPAGITICA 126 (J.C. Suffolk ed., 1968).

55. JOHN STUART MILL, ON LIBERTY (Curran V. Shields ed., 1956).

56. See Murray Dry, *The First Amendment Freedoms, Civil Peace and the Quest for Truth*, 15 CONST. COMMENTARY 325, 339 (1998).

57. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15 (1982).

58. Leon Carnovsky, *The Obligations and Responsibilities of the Librarian Concerning Censorship*, in THE FIRST FREEDOM 312, 314 (Robert B. Downs ed., 1960).

59. Cf. SCHAUER, *supra* note 57, at 17 (finding "no cause to question the assumption that truth is valuable").

perspective, "those who have power continue to have the greatest opportunities to speak in an effective manner."⁶⁰ Others criticize the marketplace metaphor on the ground that "it is wrong to assume that truth necessarily will trump over falsehood; history shows that people may be swayed by emotion more than reason."⁶¹ Even the United States Supreme Court has recognized flaws in the marketplace metaphor, particularly on the access problem, observing in 1974 that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media nearly impossible."⁶²

A. *The University as a Marketplace of Ideas*

For all its flaws, the marketplace metaphor, with its search for truth as its telos, has been linked closely by the Supreme Court to higher education and the public university. This is not surprising. The 1940 "Statement of Principles on Academic Freedom and Tenure"⁶³ adopted by the American Association of University Professors clearly evokes marketplace imagery of a free search for discovery of the truth in higher education. It provides that "[i]nstitutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the *free search for truth and its free exposition*."⁶⁴

Alexander Meiklejohn, the philosopher-educator⁶⁵ whose theory of democratic self-governance and the First Amendment has been linked to United States Supreme Court decisions involving freedom of speech,⁶⁶ once observed that it is the business of universities "to discover truth in its more intellectualized forms and to

60. Robert Jensen & Elvia R. Arriola, *Feminism and Free Expression: Silence and Voice*, in *FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION* 195, 197 (David S. Allen & Robert Jensen eds., 1995).

61. CHEMERINSKY, *supra* note 50, at 754.

62. *Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241, 251 (1974).

63. THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 594 n.2 (1970) (quoting *1940 Statement of Principles on Academic Freedom and Tenure*, 54 BULL. OF THE AM. ASSOC. OF UNIV. PROFESSORS 384 (1968)).

64. *Id.* at 594 (emphasis added).

65. See generally ALEXANDER MEIKLEJOHN: *TEACHER OF FREEDOM* (Cynthia Stokes Brown ed., 1981) (combining a collection of Meiklejohn's educational, philosophical, and legal writings with biographical information). Meiklejohn "wanted higher education to develop social intelligence in students" which he defined as "the ability to control one's social environment." MICHAEL R. HARRIS, *FIVE COUNTERREVOLUTIONISTS IN HIGHER EDUCATION* 46 (1970). Ultimately, he believed "that the college, standing apart from its social environment, should develop in its students the intelligence to become responsible citizens of a democratic society." *Id.* at 163.

66. The United States Supreme Court's seminal defamation decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "is often understood to reflect the conception of freedom of expression advocated by Alexander Meiklejohn—a conception of self-government, connected to the American principle of sovereignty." CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 206 (1993) (citation omitted); see also BOLLINGER, *supra* note 45, at 49 (observing what he calls an axiomatic "Meiklejohn-Sullivan alliance"). The source of this link often is attributed to a 1964 law journal article about *Sullivan* that made specific reference to Meiklejohn. See Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 209 (contending that the *Sullivan* opinion "almost literally incorporated Alexander Meiklejohn's thesis that in a democracy the citizen as ruler is our most important public official"). Bollinger argues that Kalven's article confirmed the association between the Supreme Court's reasoning in *Sullivan* and the philosophy of Meiklejohn. See BOLLINGER, *supra* note 45, at 49.

make it powerful in the guidance of the life of the community," with the responsibility of teachers and scholars being "to the people who need the truth."⁶⁷ Put more bluntly and recently by Professor George S. Worgul of Duquesne University, "[f]reedom in the academy exists to pursue and serve truth. The faculty and students of every discipline have not only the right, but also the duty to embrace this noble enterprise with dedication and vigor."⁶⁸

When the marketplace of ideas metaphor is linked to the concept of academic freedom,⁶⁹ an ethos of open and free exchange of ideas and quest for the truth emerges in the jurisprudence of higher education. The United States Supreme Court embraces this ethos. For instance, in *Sweezy v. New Hampshire*⁷⁰ the Court held that the "essentiality of freedom in the community of American universities is almost self-evident" and admonished that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."⁷¹ Just as discovery of the truth is the telos of the marketplace metaphor, the Court emphasized that "new discoveries" are a fundamental goal of scholarship.⁷²

The winning case for academic freedom in *Sweezy*, it should be noted, was argued by famed First Amendment theorist Thomas I. Emerson.⁷³ Emerson would later describe the goals of the public university in marketplace terminology in his classic book, *The System of Free Expression*.⁷⁴ He wrote that the university "performs two main functions in a democratic society. One is the transmission of existing knowledge and values to the coming generation. The other is the *critical reexamination of existing, and a search for new, knowledge and values*, with a view to facilitating orderly change"⁷⁵

Although the Supreme Court did not explicitly invoke the marketplace of ideas in 1957 in *Sweezy*, it did so ten years later in another higher education case. In *Keyishian v. Board of Regents*,⁷⁶ Justice William Brennan wrote for the five-justice majority that "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth"⁷⁷

The Supreme Court would soon extend the marketplace of ideas metaphor beyond the narrow confines of the classroom. In 1972, in *Healy v. James*,⁷⁸ the Court added to the above-quoted language from *Keyishian* and wrote that "[t]he college classroom *with its surrounding environs* is peculiarly the 'marketplace of

67. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 128 (1960).

68. George S. Worgul, Jr., *Truth, Cultural Pluralism and Academic Freedom*, in *ISSUES IN ACADEMIC FREEDOM* 143, 143 (George S. Worgul, Jr., ed., 1992).

69. The concept of academic freedom itself "eludes precise definition" but suggests an ideal world in which "faculties may best flourish in their work as teachers and researchers." WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 299 (3d ed. 1995).

70. 354 U.S. 234 (1957).

71. *Id.* at 250.

72. *Id.*

73. *See id.* at 235.

74. EMERSON, *supra* note 63.

75. *Id.* at 617 (emphasis added).

76. 385 U.S. 589 (1967).

77. *Id.* at 603 (emphasis added).

78. 408 U.S. 169 (1972).

ideas.”⁷⁹ With this move, the Court suggested a university campus—not just the classroom—is indeed a marketplace of ideas. As discussed later in Part IV, there may be separate curricular and extracurricular marketplaces within a university, each serving a different role or function.

The marketplace language from *Healy* would be cited favorably in 1981 by the Court in *Widmar v. Vincent*.⁸⁰ In *Widmar*, the Court concluded that the University of Missouri at Kansas City could not constitutionally deny access to a student group with a religious affiliation when the facilities were otherwise open to registered student groups.⁸¹ The case marked a victory for the religious right and a defeat for the University, which had argued that the Establishment Clause of the First Amendment prevented it from giving access to its facilities to a religious-affiliated group.⁸²

Widmar suggests that the university-as-marketplace vision set forth by the Court encompasses not just some theoretical ideal about the search for truth or an in-class philosophy about education, but also the actual *physical premises* of the university. *Widmar*, in brief, gave bricks and mortar to the marketplace metaphor. The Court described the University of Missouri as creating a “forum” for student groups;⁸³ the forum, in other words, is the *physical marketplace, not merely a metaphorical one*. As the second step in the logic chain set forth in the Introduction suggests, equality of access to the marketplace of ideas—including the physical marketplace—is valued by the Court and reflected in *Widmar*.

The principle of equality of access to the *physical marketplace* of ideas in academia later would be extended in 1995 by the Supreme Court to the *fiscal marketplace*. In *Rosenberger v. University of Virginia*,⁸⁴ the Court twice invoked the marketplace metaphor in holding unconstitutional a denial of funding from mandatory student activity fees for a student-written journal that published with a Christian editorial viewpoint.⁸⁵ Like *Widmar*, exclusion from the university marketplace in *Rosenberger* was premised on Establishment Clause grounds of separation of church and state.⁸⁶

In rejecting the dissent’s view that the University of Virginia’s denial of funding was not viewpoint-based because it applied equally to all religious groups and not just to a few, the five-justice majority held that the Court’s “understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the *marketplace of ideas*.”⁸⁷ The majority wrote:

If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the

79. *Id.* at 180 (emphasis added).

80. 454 U.S. 263, 268-69 (1981).

81. *See id.* at 277.

82. *See id.* at 270-71 (writing that the university argued that “it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause of the Constitution of the United States”).

83. *Id.* at 277.

84. 515 U.S. 819 (1995).

85. The marketplace metaphor was invoked by Justice Kennedy in the majority opinion, *see id.* at 831, and by Justice O’Connor in the concurring opinion. *See id.* at 850.

86. *See id.* at 837.

87. *Id.* at 831 (emphasis added).

debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.⁸⁸

In buttressing its marketplace logic, the *Rosenberger* majority considered the public university to be "one of the vital centers for the Nation's intellectual life"⁸⁹ and a place of "thought and experiment."⁹⁰ In this light, Justice O'Connor concurred that the student fees in *Rosenberger* were used "to further the University's purpose in maintaining a *free and robust marketplace of ideas*, from whatever perspective."⁹¹ Although the constitutionality of mandatory fees per se was not at issue in *Rosenberger*, what is important is that the Court considered equality of access to such fees paramount based on the logic of a diverse marketplace of ideas as a worthy objective.⁹²

B. Non-University Idea Marketplaces

Many locations and institutions—not just public universities—can be considered distinct marketplaces of ideas. There may be many "mini-marketplaces" ranging from state fair grounds to airport terminals to areas that are picketed in a labor dispute.⁹³ Indeed, the United States Court of Appeals for the Eleventh Circuit remarked in a March 2000 decision that the marketplace of ideas metaphor "governs in public fora."⁹⁴

At the macro level, however, the entire country can be thought of as a single marketplace of ideas. Rather than identifying distinct marketplaces, one may simply consider the United States as a marketplace in which all ideas are traded. In fact, the United States Supreme Court most often does *not* place institutional or geographical limitations on the marketplace of ideas when it employs the concept. Instead, the marketplace of ideas is referred to *without* modification or limitation.⁹⁵

For instance, when considering the constitutionality of New York's so-called "Son of Sam" law in 1991, the Supreme Court wrote that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from *the marketplace*."⁹⁶ The

88. *Id.* at 831-32.

89. *Id.* at 836.

90. *Id.* at 835.

91. *Id.* at 850 (O'Connor, J., concurring) (emphasis added).

92. Justice O'Connor wrote in *Rosenberger* that "although the question is not presented, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." *Id.* at 851 (O'Connor, J., concurring).

93. Hopkins, *supra* note 47, at 47.

94. Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1103 (11th Cir. 2000).

95. See, e.g., United States v. National Treasury Employees Union, 513 U.S. 454, 464 (1995) (observing that "[f]ederal employees who write for publication in their spare time have made significant contributions to *the marketplace of ideas*" (emphasis added)). The Court here does not modify the marketplace by referring to it as "literary" marketplace, even though it specifically cites literary writers and novelists such as Nathaniel Hawthorne and Herman Melville to illustrate its point about federal employees who wrote in their spare time. *Id.* at 464-65.

96. Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 116 (1991) (emphasis added).

Court uses the term "the marketplace"; it does *not* place a modifier, geographic or otherwise, between the words "the" and "marketplace."

The same lack of modification holds true for the relationship between advertisements and the marketplace metaphor. Some may consider the realm of commercial speech to constitute its own special marketplace, yet the Court suggests that advertising is merely part of a much larger, macro-level marketplace of ideas. For example, in its 1996 decision in *44 Liquormart, Inc. v. Rhode Island*,⁹⁷ striking down a ban on retail liquor price advertising, the Court wrote that "it was error to assume that commercial speech was entitled to no First Amendment protection or that it was without value in *the marketplace of ideas*."⁹⁸ Commercial speech, in brief, is not seen as a distinct marketplace but one within a larger marketplace of ideas.

Idea marketplaces need not, however, be geographically or topically defined, whether it be on the micro or macro level. They may, instead, be characterized by *medium*. In *Reno v. ACLU*,⁹⁹ the Court called the Internet a "new marketplace of ideas."¹⁰⁰ The Court's medium-specific First Amendment jurisprudence, in which the level of protection speech receives is influenced by the medium on which it is conveyed, suggests that there may be separate marketplaces for print, broadcast, cable, and, now, the Internet.¹⁰¹ In *Reno*, the Court observed that characteristics of the broadcast medium, including spectrum scarcity and its invasive nature, provide "special justifications" that are not present on the Internet for more closely regulating the broadcast marketplace of ideas.¹⁰²

C. Bridging the University and Broadcast Marketplaces: The Audience's Right to Receive Speech

As noted in the Introduction, the medium-based marketplace of over-the-air broadcasting shares important characteristics with the public university-based marketplace. Both involve restricted and finite access. Both are government mandated and administered to serve the public interest.¹⁰³ Both use speech—be it videotaped programs broadcasted on television or live lectures in classrooms—as the primary means of serving the public interest.

In the context of the broadcast marketplace, the Supreme Court in *Red Lion Broadcasting Co. v. FCC*¹⁰⁴ observed that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."¹⁰⁵ This marketplace goal provided sufficient rationale for upholding the Fairness Doctrine as a mechanism for,

97. 517 U.S. 484 (1996).

98. *Id.* at 496 (emphasis added).

99. 521 U.S. 844 (1997).

100. *Id.* at 885.

101. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1005 (2d ed. 1988) (describing "the tension between the Supreme Court's radically divergent approaches to the print and electronic media").

102. *Reno v. ACLU*, 521 U.S. at 868.

103. See *supra* note 33 and accompanying text.

104. 395 U.S. 367 (1969).

105. *Id.* at 390.

as its name suggests, enhancing fairness and speech within the broadcast marketplace of ideas. By analogy, of course, mandatory fee assessments at public universities that are disseminated in viewpoint-neutral fashion to many student groups also enhance fairness and speech within the academic marketplace of ideas.

But the Court in *Red Lion* added another crucial statement that links the justifications for marketplace-enhancing measures in both the broadcast and academic spheres. The Court observed that “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”¹⁰⁶ Here, the Court is suggesting an affirmative right¹⁰⁷ of the audience within the marketplace—a right protected by the First Amendment—to receive speech and, in particular, to receive a diversity of messages.¹⁰⁸ The First Amendment, within the context of the broadcast marketplace, thus exists to protect not only the broadcasters’ speech rights but, more importantly, the audience’s rights to receive speech. The marketplace metaphor clearly pivots on the ability of the audience to receive the information it needs in order to discover or test the truth.¹⁰⁹ As the Court in *Red Lion* wrote, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”¹¹⁰

Viewed in the context of the audience’s right to receive a diversity of messages, the marketplace intervention measure of mandatory fee assessments at public universities to support the speech of a myriad of student groups makes perfect sense. The chain of logic here, similar to the one set forth in the Introduction, is simple. First, the student body represents the audience within the academic marketplace. Second, if a primary goal of higher education is viewed as either a quest for, or a testing of, the truth by students, then the audience—the student body—*must* receive as many different and contrasting messages as possible to become as knowledgeable as possible. Third, mandatory student fees paid out to student groups holding diverse points of view allow, at least theoretically, more ideas to be either sustained or initially placed into the academic marketplace. This, in turn, helps the student body audience gain more information in its quest for the truth.

The benefit here is to more than just a few fund-seeking groups. In particular, the more information that is placed in the academic marketplace, the greater the benefit to all students who study, work, and reside within that marketplace, not simply to those groups directly receiving funding. It is, ultimately, the audience of students in the academic marketplace on whom the constitutional and free-speech

106. *Id.* (emphasis added).

107. For a discussion of affirmative theories of the First Amendment see Theodore L. Glasser, *Press Responsibility and First Amendment Values*, in *RESPONSIBLE JOURNALISM* 81, 89-92 (Deni Elliott ed., 1986).

108. An implied or unenumerated First Amendment right to receive speech can be found in a number of Supreme Court decisions. For instance, the Court has observed, in the context of finding a constitutional right to privacy, that “[t]he right of freedom of speech and press includes not only the right to utter or to print, but [also] the right to distribute, [and] the right to receive.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (emphasis added). Later, in considering a First Amendment right of access to criminal trials, the Court opined that “[f]ree speech carries with it some freedom to listen.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

109. “The marketplace theory assumes that unrestrained speech aids *listeners* in finding truth ...” *BAKER*, *supra* note 47, at 11 (emphasis added).

110. *Red Lion Broad. Co. v. FCC*, 395 U.S. at 390.

focus must rest. The unenumerated or implied First Amendment "freedom of access to information"¹¹¹ is pivotal within the idea marketplace of the public university. The more information to which students have access, the better able they are to engage in a quest for knowledge and, within the framework of the marketplace metaphor, the truth.

In a 1965 decision protecting the privacy right of married couples to use contraception, the Court specifically linked an implied First Amendment right to receive information with "the freedom of inquiry" and "the freedom of the entire university."¹¹² Within the context of the marketplace of ideas metaphor, of course, freedom of inquiry is enhanced when more speech is placed in the marketplace and when more people—read, *more students*—have a right to receive that information.

D. Summary

This Part has suggested that the marketplace of ideas metaphor, although flawed in many respects, pervades First Amendment jurisprudence. Of particular relevance and concern for analysis of the *Southworth* decision below in Part III is the additional fact that the metaphor is closely linked to the Supreme Court's reasoning in speech cases involving public universities. Part II also has argued that casting the spotlight on the First Amendment rights of the *audience*, rather than on the rights of individual or organizational *speakers*, within the context of the access-restricted and public-interest marketplaces of both broadcasting and state-related higher education is important. It justifies marketplace intervention measures such as the Fairness Doctrine and mandatory fee assessments, respectively. With these issues and arguments in mind, the next Part analyzes the case of Scott Southworth and his co-plaintiffs from the University of Wisconsin-Madison.

III. FEES AND FUNDING, SILENCE AND SPEECH: *BOARD OF REGENTS V. SOUTHWORTH*

Contrasting quotes from key players, uttered both before and after the United States Supreme Court's decision in *Board of Regents v. Southworth*, dramatically capture both the essence of the arguments in this case and, perhaps more importantly, the depth of the passion felt in the dispute. The following opinions were voiced *before* the Court's decision upholding the right of public universities to enforce mandatory student activity fees that are distributed in a viewpoint-neutral fashion to a range of student organizations:

- "The Constitution doesn't guarantee you a right to speak with anyone's else's money."¹¹³
- "I really dislike having my student fees going to certain groups, but I respect the forum of open ideas."¹¹⁴

111. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585 (1980) (Brennan, J., concurring).

112. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

113. Joan Biskupic, *Court to Review Student's Objection to Activity Fees*, WASH. POST, Nov. 7, 1999, at A02 (quoting Scott Southworth, Plaintiff-Respondent).

114. Kelly O'Connor, *Supreme Court to Hear Student Fee Case*, THE MICH. DAILY (Apr. 26, 2000) <<http://www.pub.umich.edu/daily/1999/apr/04-05-99/news/news4.html>> (quoting Erin Clare Quinn, University of Wisconsin Student Government).

After the Court's decision went against Southworth and in favor the University of Wisconsin, there were these diametrically opposite reactions:

- "I don't worship the Supreme Court... . Certainly they're humans and they have a right to an opinion, and I have to respect that opinion. But my faith is in God and not the judicial system."¹¹⁵
- "It confirms that a core part of the university's mission is to be a forum for the free exchange of ideas... . This is a landmark decision for higher education."¹¹⁶

Lyall's remarks about the university as a forum for free exchange of ideas, echoing those of Quinn about a forum of open ideas, evoke a clear image of the venerable marketplace metaphor.¹¹⁷ How the Court reached a decision in *Southworth* that supports this idealistic vision of expression with compelled funding of extracurricular student organizations is described below.

A. The Fee Assessment Program

Full-time students at the Madison campus of the University of Wisconsin pay a nonrefundable activity fee distinct from the University's tuition charge.¹¹⁸ About twenty percent of the fees collected are distributed in one of three ways—two by way of formal requests to student government committees¹¹⁹ and one via student referendum¹²⁰—to support registered student organizations' (RSOs) extracurricular activities.¹²¹

RSOs are non-profit organizations composed primarily of students who agree with the University to engage in activities related to student life on campus.¹²² Of the 623 RSOs at Madison in the 1995-96 school year,¹²³ about thirty percent received funding from student activity fees.¹²⁴ Some of these funded groups en-

115. Richard Willing & Mary Beth Marklein, *Supreme Court Unanimously Upholds Required Student Fees*, USA TODAY, Mar. 23, 2000, at 4A (quoting Scott Southworth, Plaintiff-Respondent).

116. Elizabeth Brixey, *High Court Rules for UW in Fees Case*, WIS. ST. J., Mar. 23, 2000, at 1A (quoting Katharine Lyall, President of the University of Wisconsin System).

117. Others agreed that the decision embraces the university as a marketplace of ideas. See, e.g., Tony Mauro, *Schools' Use of Fees is Protected*, THE RECORDER, Mar. 23, 2000, at 1 (quoting Thomas Baker, professor at Drake University School of Law, as stating in reaction to the *Southworth* decision that "[t]o this Court, the marketplace of ideas is on the Internet and on university campuses") (alteration in original).

118. See Board of Regents v. Southworth, 120 S. Ct. 1346, 1350 (2000). According to the University of Wisconsin's brief to the Supreme Court, "[t]he imposition of a student fee separate from tuition has a long history... dating from at least 1848." Brief for Petitioners at 7, Board of Regents v. Southworth, 120 S. Ct. 1346 (2000) (No. 98-1189).

119. See Board of Regents v. Southworth, 120 S. Ct. at 1351. One of these two avenues involves applying for funds from the Student Government Activity Fund, a pool of money administered by the student government—the Associated Students of Madison (ASM)—to cover RSO's operations, events, and related travel expenses. See *id.* The other avenue entails applying to the General Student Services Fund, controlled by the ASM's finance committee. See *id.*

120. See *id.* The referendum process allows the student body to vote to approve or disapprove—to defund or veto—a funding decision made by the ASM.

121. See *id.* at 1350-52.

122. See *id.* at 1351.

123. See *id.*

124. See *id.* at 1352.

gaged in campus service activities, such as tutoring and counseling, while others took part in more political and ideological expression.¹²⁵

Of particular concern to the plaintiffs in *Southworth* were eighteen RSOs that engaged in political and ideological activities that conflicted with their own conservative, Christian beliefs.¹²⁶ These groups, comprising a veritable left-leaning laundry list, included, among others, Amnesty International, the Campus Women's Center, the International Socialist Organization, the Lesbian, Gay, Bisexual Campus Center, the Militant Student Union, and the student chapter of the National Organization for Women.¹²⁷

The parties in *Southworth* stipulated, however, that funds distributed by the student government and its finance committee to organizations such as these are allocated in a manner that does *not* discriminate against or take into account the viewpoint of a group.¹²⁸ In other words, the review-and-approve process is administered in a fashion that is viewpoint neutral.¹²⁹ On the other hand, groups can also obtain funding from the student activity fees by a referendum process of student body voting.¹³⁰ The parties did *not* stipulate as to whether or not this voting process was viewpoint neutral.¹³¹

B. The Attack

The argument of Scott Southworth and his fellow students objecting to the mandatory fee assessment process is easily summarized. As Southworth's attorneys argued in their brief to the United States Supreme Court, "[t]he analysis of the University's mandatory fee system must begin with the First Amendment right not to speak."¹³² After initially citing a string of cases in which the Court has recognized this unenumerated right to remain silent¹³³—a right not to be compelled by the government to speak—the brief then continues that "the government can also violate people's First Amendment right not to speak by forcing them to contribute financially to private advocacy groups."¹³⁴ The right not to speak, in other words, sweeps up and encompasses the right not to fund others' speech.

This compelled-speech/compelled-funding argument hinged on the results of what Southworth and his colleagues termed "the *Abod-Keller* line of cases."¹³⁵ In 1977 in *Abod v. Detroit Board of Education*,¹³⁶ the United States Supreme

125. See *id.* at 1351.

126. See Brief for Respondents at 1, *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000) (No. 98-1189).

127. See *id.* at 1-2.

128. See *Board of Regents v. Southworth*, 120 S. Ct. 1346, 1351 (2000).

129. See *id.*

130. See *id.*

131. See *id.*

132. Brief for Respondents at 13, *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000) (No. 98-1189).

133. See *id.* at 14-15 (citing, among other cases, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group Inc.*, 515 U.S. 557 (1995); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

134. *Id.* at 15.

135. *Id.* at 16.

136. 431 U.S. 209 (1977).

Court considered an “agency shop” arrangement that compelled every employee represented by a union—including *non-union* members—to pay, as a condition of employment, a service fee to the union equal in amount to dues paid by union members.¹³⁷ Some non-union members objected that the union spent part of their money on political and economic activities that were not related to the collective bargaining function of the union.¹³⁸ They asserted that, under the First Amendment freedom of association, they could not be compelled to contribute to that portion of the service charge that was not related to collective bargaining.¹³⁹ In particular, they argued “that they may constitutionally prevent the Union’s spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.”¹⁴⁰

The Court in *Abood* held that this argument was “a meritorious one.”¹⁴¹ It ruled that, although unions may constitutionally spend funds on political and ideological activities not germane to their duties as collective-bargaining representatives, they may *not* finance such expenditures with dues or fees paid by employees who object to those ideas.¹⁴² The Court wrote that unions are prohibited from requiring contributions by an individual to support an ideological cause he or she opposes as a condition of employment.¹⁴³

In 1990 in *Keller v. State Bar*,¹⁴⁴ the Supreme Court ruled that although “lawyers admitted to practice in [California] may be required to join and pay dues to the State Bar,”¹⁴⁵ the Bar cannot compel members to “fund activities of an ideological nature which fall outside of those ... activit[ies]”¹⁴⁶ germane to the Bar’s interest in “regulating the legal profession and improving the quality of legal services.”¹⁴⁷ The Court noted that although the line between germane and non-germane activities was not clear, “[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative” but may be used “for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.”¹⁴⁸

In *Southworth*, the Court distilled the “constitutional rule” from its *Abood* and *Keller* decisions into one that limits required subsidies “to speech germane to the purposes of the union or bar association.”¹⁴⁹ Scott Southworth and his colleagues, however, argued that the cases stood for a much broader principle—one tied to the writings of both Thomas Jefferson and James Madison.¹⁵⁰ They contended that

137. *Id.* at 211.

138. *See id.* at 213.

139. *See id.*

140. *Id.* at 234.

141. *Id.*

142. *See id.* at 235-36.

143. *See id.* at 235.

144. 496 U.S. 1 (1990).

145. *Id.* at 4.

146. *Id.* at 14.

147. *Id.* at 13-14.

148. *Id.* at 16.

149. Board of Regents v. Southworth, 120 S. Ct. 1346, 1355 (2000).

150. *See* Brief for Respondents at 11-18, Board of Regents v. Southworth, 120 S. Ct. 1346 (2000) (No. 98-1189).

"[i]n order to guard the individual's right of conscience from government infringement, the First Amendment broadly prohibits government efforts to force unwilling citizens to contribute to the private speech of others."¹⁵¹ Southworth's contention, in turn, was that the mandatory fee assessment at the University of Wisconsin that was spent on groups espousing ideological and political beliefs contra to his own "violates this foundational First Amendment principle."¹⁵² Without satisfying the strict scrutiny standard of review that typically applies to content-based laws,¹⁵³ Southworth argued, the fee assessment policy was unconstitutional.¹⁵⁴

Before turning to the University's defense, it is important to note that Southworth's brief to the Supreme Court openly acknowledged that "[t]he university environment [is] a marketplace of ideas."¹⁵⁵ It even quoted Justice Holmes's famous "competition of the market" dictum from *Abrams v. United States* discussed earlier in this Article.¹⁵⁶ Yet Southworth's attorneys gave short shrift to the power of the marketplace metaphor by arguing immediately thereafter that "[i]n a marketplace of ideas at a state university or elsewhere, the First Amendment prohibits government from compelling people to fund the speech of others."¹⁵⁷

As this Article asserted earlier, the problem in the critical chain of reasoning that exposes the flaws in Southworth's logic¹⁵⁸ is that the public university marketplace is *not* like marketplaces "elsewhere" in terms of its mission or function. The mission or function of a university justifies marketplace intervention in the form of compelled subsidization of diversity of expression. The next Section, presenting the University of Wisconsin's position, makes this clear.

C. The Defense

The University of Wisconsin's argument centered on the theory that the mandatory fee assessment furthers its mission as an institution of higher education by exposing students to a diverse set of views. As the University stated in its brief to the Supreme Court, the fee assessment does not offend the First Amendment interests of students but, in fact, "furthers First Amendment values by promoting vigorous debate in an educational setting entirely suited to that discussion."¹⁵⁹

The University's argument—blending the mission and purpose of universities with the premises of unfettered speech and debate in the marketplace of ideas—is captured well in this short section of its brief:

Universities have a long tradition of being centers for vigorous discourse as part of their role in preparing the leaders of tomorrow, and this tradition has never

151. *Id.* at 18.

152. *Id.*

153. See *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) (stating that the government may regulate the content of speech "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

154. See Brief for Respondents at 19-31, *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000) (No. 98-1189).

155. *Id.* at 26.

156. *Id.* at 25-26.

157. *Id.* at 26.

158. See *supra* note 10 and accompanying text.

159. Brief for Petitioners at 22, *Board of Regents v. Southworth*, 120 S. Ct. 1346 (2000) (No. 98-1189).

been limited to the classroom. The Board of Regents of the University of Wisconsin System has determined that an essential function of its educational mission is to encourage students to engage in the expression of ideas of interest to them, by providing a modest subsidy to facilitate expressive activity. The Board of Regents has also determined that it is essential to provide certain services to a diverse population, which at times also involve the expression of diverse viewpoints. Accordingly, the University funds these services and expressive resources through mandatory student fees.¹⁶⁰

Building from this public policy principle, the University contended that this was *not*, contrary to Southworth's argument, a case of compelled speech at all. As the University stated, Southworth and his fellow fee objectors "were not required either to speak or to become members of any group, but merely to fund, along with all other students at the University of Wisconsin-Madison, a limited public forum, in which all might participate."¹⁶¹ The University drew a marked "distinction between being forced to fund a podium for all speech and being forced to fund an individual group speaking at that podium."¹⁶² Its program arguably constituted the former, not the latter.

The University also distinguished the *Abood* and *Keller* decisions that were central to Southworth's argument. It argued that in those cases, "the funded speech was that of the compulsory membership organization itself—the union's own lobbying activities in the Legislature; the bar association's efforts to promote a nuclear free zone. By contrast, in the instant case, the challenged funding facilitates the speech of many groups" on a viewpoint-neutral basis.¹⁶³ The University contended that the "salient feature [in *Abood* and *Keller*] was that only a single point of view was funded."¹⁶⁴

D. The Decision

In a unanimous ruling, the United States Supreme Court held that "[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral."¹⁶⁵ Three justices—Souter, Stevens, and Breyer—joined in a concurring opinion that went even further by not requiring the imposition of a viewpoint-neutral distribution system to sustain the constitutionality of a mandatory fee assessment program.¹⁶⁶

Writing the opinion for the Court, Justice Anthony Kennedy gave wide deference and discretion to public universities in defining both their missions and how best to serve them. Kennedy wrote:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific.

^{160.} *Id.* at 21.

^{161.} *Id.* at 25.

^{162.} *Id.* at 22.

^{163.} *Id.* at 23.

^{164.} *Id.* at 30.

^{165.} Board of Regents v. Southworth, 120 S. Ct. 1346, 1350 (2000).

^{166.} See *id.* at 1357 (Souter, J., concurring). Justice Souter wrote, "I agree that the University's scheme is permissible, but do not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it." *Id.*

social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.¹⁶⁷

The University's desire to, as the Court stated, "foster vibrant campus debate among students"¹⁶⁸ and "stimulate the whole universe of speech and ideas"¹⁶⁹ trumped the desire of Southworth to prevent his money from funding this marketplace of ideas. The Court held that this must be the case, despite acknowledging that "[i]t is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs."¹⁷⁰

The Court distinguished the *Abood* and *Keller* line of cases involving compelled union dues and bar fees, and the related rule that compelled funds can only be used for activities "germane" to those institutions' purposes. Unlike the specific interests and viewpoints the funds in those cases went to support, the Court wrote in *Southworth* that there are not discernable limits to the speech advanced by the fee assessment program in a university setting.¹⁷¹ Justice Kennedy wrote, quite deferentially, that "[i]t is not for the Court to say what speech is or is not germane to the ideas to be pursued in an institution of higher learning."¹⁷² The First Amendment interest of Southworth not to fund speech with which he disagrees, the Court reasoned, is adequately protected by dispersing fees on a viewpoint-neutral basis.¹⁷³ This viewpoint-neutral mandate, the Court wrote, ensures "that minority viewpoints are treated with the same respect as are majority views."¹⁷⁴ The marketplace of ideas, in other words, will not be skewed deliberately under this system to any one particular set of views or opinions.

IV. MAKING SENSE OF THE ACADEMIC MARKETPLACE AFTER *SOUTHWORTH*

Carved in stone on a wall at the front entrance of Penn State's main library at the University Park campus are several inscriptions. One, in particular, seems especially relevant for evaluating the meaning and ramifications of the *Southworth* decision. It reads, quite simply: "*The true university is a collection of books.*"

To entering freshmen, this surely must seem an odd, if not discouraging, declaration. How could a university, one perhaps best known for its triumphant septuagenarian football coach, really be nothing more than a collection of physical objects comprised of yellowing—and, regrettably, sometimes unopened—leaves of paper? Surely a university is more than just a warehouse that stores a bevy of bound documents produced from wood pulp.

This quotation, of course, is intended to be understood at more than a simple descriptive or denotative level.¹⁷⁵ It connotes something deeper. The physical

167. *Id.* at 1356.

168. *Id.*

169. *Id.* at 1355.

170. *Id.*

171. *See id.*

172. *Id.*

173. *See id.* at 1356.

174. *Id.* at 1357.

175. *See generally* STUART HALL, REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 38-39 (1997) (describing the differences between denotative and connotative meanings).

objects—the collection of books—contain *ideas*. The books, then, merely are physical manifestations of ideas, preserving them for others to study, debate, and, perhaps, debunk.

Viewed in this light, the meaning of the inscription “[t]he true university is a collection of books” changes. The true university, in fact, really is a *collection of ideas*. Extrapolating from this deeper interpretation, it is not too much of a leap to reach the understanding that *the true university is a marketplace of ideas*. Students may enter the library—the collection of books—and, in doing so, take part in the marketplace of ideas. They may check out those ideas, taking them home for study purposes, or they may simply choose to ignore them and leave them in the stacks.

Like the inscription on the front of Pattee Library at Penn State, the *Southworth* decision also suggests that the true university is a collection of ideas and, in particular, a diversity of ideas. The ideas in *Southworth*, however, do not manifest themselves in the form of books, but rather in the form of registered student organizations. These RSOs, like library books, hold ideas ready for dissemination in the university marketplace.

Students, of course, may not—and need not—agree with all of the ideas contained in the university marketplace. Thus, just as they need not check out books that they do not enjoy, they also need not join or associate with the groups and organizations they disdain. The groups, similar to the books, contain ideas from which students are free to choose to shun or use.

Although one may freely choose not to read a book or join a group, the *funding* of books and groups is a very different matter. To the extent that tuition dollars, in part, go to fund the purchase of books—read more deeply, the purchase of *ideas*—for university libraries, it should not be too surprising that mandatory fee assessments, in part, go to fund the dissemination of ideas *outside* of the library and classroom. In addition, just as a conservative student should not be able to request a reduction in tuition dollars so as not to fund the purchase of library books lauding Karl Marx or Bill Clinton, so too should a conservative student not be able to opt out of paying a fee assessment that supports the International Socialist Organization or the Student Labor Action Coalition.

This Part of the Article examines and unpacks the *Southworth* decision and its implications. It initially suggests that the Court’s opinion represents not just a win for the marketplace metaphor but also for the value of tolerance. The Part then questions whether, in fact, support of extracurricular university marketplaces in the form of fee assessments actually supports true competition of ideas. Finally, this Part connects the concept of the marketplace of ideas and the practice of mandatory fee assessments with the hotly contested issue of affirmative action in higher education.

A. A Victory for Tolerance in the Marketplace and the Public University

The *Southworth* decision represents not just a victory for the marketplace of ideas metaphor as a guidepost for First Amendment jurisprudence affecting academia, but it also signals a triumph for the concept of *tolerance* within the university marketplace. In particular, one can argue that the lesson Scott Southworth and his colleagues should glean from the Court’s ruling is that the principle of free

speech in a free society includes tolerating the speech of others with whom we may disagree.

University of Michigan President Lee C. Bollinger, a First Amendment scholar and former dean of University of Michigan Law School, argues in *The Tolerant Society* that "free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."¹⁷⁶ We must, in general, be tolerant of speech that we find intolerant. Bollinger writes that "there does seem to be a shared intuition that the society adds something important to its identity, that it is significantly strengthened, by these acts of extraordinary tolerance."¹⁷⁷ He links the concept and goal of tolerance to what he calls the "quest for the tolerant mind."¹⁷⁸

If universities are in no small measure about the proverbial life of the mind, then Scott Southworth surely had an intolerant mind. He should take away from the decision that bears his name the idea that free speech means that we must tolerate some ideas that we find offensive. Campus speech codes that sought to squelch intolerant speech from the far right fringe—racist, sexist, or homophobic expression—repeatedly have been held unconstitutional,¹⁷⁹ reflecting the idea that we gain strength of character and identity by acting with restraint and tolerating such bigoted bile. The same principle of tolerance that militates against the constitutionality of speech codes thus holds true as applied to mandatory fee assessments. We must tolerate a system that supports speech with which we may disagree.

The late Justice William Brennan wrote, in holding that flag burning is a form of speech protected by the First Amendment, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹⁸⁰ By targeting the University of Wisconsin's fee assessment program and seeking to defund groups with whom he disagreed, Scott Southworth was essentially trying to stifle speech that he found offensive or disagreeable. Southworth's money, it must be emphasized, was not endorsing this speech—it was merely funding *both* the speech that he disagreed with as well as the speech of groups with which he agreed.

Southworth need not agree with all or any of the speech that he finds in the University of Wisconsin's extracurricular marketplace, but he should at least tolerate it to the point that it is funded and so that it may, in essence, breathe. Once the speech of all groups is out in the university marketplace of ideas, then the concomitant "principle that debate on public issues should be uninhibited, robust, and wide-open"¹⁸¹ takes over and Southworth should openly challenge and test those ideas with which he disagrees. This is true *competition* in the marketplace of ideas. The maxim here should be that it is better to tolerate the placement of speech in the marketplace, and then challenge and test it, than it is to deny that

176. BOLLINGER, *supra* note 45, at 10.

177. *Id.* at 9.

178. *Id.* at 104.

179. See cases cited *supra* note 16.

180. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

181. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

speech an initial point of entry in the market.

This sentiment was expressed in another case involving mandatory fee assessments—this time at the University of California—by Justice Arabian of the Supreme Court of California. Dissenting in *Smith v. Regents of the University of California*,¹⁸² Justice Arabian attacked the majority's view that mandatory fee assessments to fund political and ideological groups violated the constitutional rights of free speech and association of those students who opposed those groups' views. He wrote:

[T]he majority betray a shocking ignorance of the University's educational mission and the vital state interest that it serves—the regeneration of those fundamental republican virtues upon which this nation was founded, and upon which its continued commitment to civil liberty depends. I am referring, of course, to the power and determination of its citizens to form and express their own opinions, to critically evaluate the opinions of others, and, most importantly, to *tolerate* the opinions of those with whom they most *disagree*.¹⁸³

The bottom line is that mandatory fee assessments not only produce a richer marketplace of ideas but also promote the value of tolerance within that marketplace. If we truly are a tolerant society and not one that calls for censorship or elimination of an idea whenever it offends, then upholding mandatory student fees embodies this goal and, more importantly, teaches tolerance in an educational setting.

B. Promoting Debate in the Marketplace: An Overlooked Goal?

Mandatory fee assessments, it surely may be assumed at this point, serve to help place more ideas in the university marketplace. Yet a look back at Justice Holmes's statement from *Abrams* suggests that something more than sheer volume or diversity of ideas is necessary.¹⁸⁴ In particular, Holmes contended that "the best test of truth is the power of the thought to get itself accepted in the *competition* of the market."¹⁸⁵

This raises a serious question overlooked by the Court in *Southworth*: Are the registered student organizations at the Madison campus really testing and challenging each others' ideas in the ideal spirit of marketplace competition or, in contrast, do these groups actually isolate and segregate students who hold different views from each other? In other words, it may be that these groups infrequently or never engage in formal debates with each other, but instead provide a safe haven under which like-minded students can congregate, associate, and, essentially, isolate themselves from those with different views. It also may be that once these groups receive funding, they engage in their own activities without actually deliberating with other organizations with contrasting viewpoints.

If this is true, then the *extracurricular* marketplace at a university that is propped up by mandatory student fees may simply be a marketplace without competition. Registered student organizations may actually represent the epitome of re-segregation of ideas if the groups do not debate each other. In contrast, the *curricular*

182. 844 R2d 500 (1993).

183. *Id.* at 518 (Arabian, J., dissenting).

184. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

185. *Id.* (emphasis added).

marketplace—the marketplace inside the classroom—actually brings students with different views together and, assuming a modicum of participation is encouraged by the professor,¹⁸⁶ allows ideas to be challenged and questioned.

It thus is important to recognize that there are at least two distinct idea marketplaces in a university—the *curricular/classroom* marketplace and the *extracurricular/non-classroom* marketplace. The Court in *Southworth* recognized these categories but treated them as one and the same for First Amendment purposes. Justice Kennedy wrote for the Court that “[t]he University may well determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their *extracurricular campus life outside the lecture hall*.”¹⁸⁷

The question becomes, however, are the First Amendment concerns of academic freedom that justify freedom inside the classroom truly co-extensive with those that allow universities to impose mandatory fee assessments outside the classroom? This may depend on how courts define the ultimate mission of universities, and whether they perceive the learning that takes place outside the lecture hall to be as important as the education that occurs inside it.

*C. Diverse Marketplaces, Diverse Student Bodies:
Implications for Racial Preferences in Admissions?*

Mandatory fee assessment programs like the one at the University of Wisconsin are designed to promote a diversity of views in the academic marketplace. They expose all students *admitted* to a particular university to a diverse range of ideas and opinions represented by a diverse group of student organizations.

Of course, it also is possible to take steps to foster a diverse marketplace of ideas *before* students are admitted to the academic marketplace. In particular, the admissions process itself can—at least theoretically—be used to select an ethnically, socially, and politically diverse student body. The assumption, clearly, is that people of diverse backgrounds will hold and espouse diverse viewpoints and, in turn, create a diverse and varied marketplace of ideas on campus.

A rich on-campus marketplace of ideas thus can be supported by at least two equally controversial and contested measures—mandatory student fee assessments that fund student organizations and preferences in the admissions process based on criteria such as race and religion. After the federal appellate decision in *Hopwood v. Texas*,¹⁸⁸ however, the constitutionality of the latter procedure is unclear and may vary among the appellate circuits.¹⁸⁹ Most importantly, the Fifth Circuit Court of Appeals in *Hopwood* held that “any consideration of race or ethnicity by the law school for the purpose of achieving a *diverse student body* is not a compelling

186. In many large lecture classes at public universities, true student participation is exceedingly rare. Lectures often are more for the transmission of information than for contesting and challenging that information.

187. Board of Regents v. Southworth, 120 S. Ct. 1346, 1356 (2000) (emphasis added).

188. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

189. The United States Court of Appeals for the Fifth Circuit held in *Hopwood* that the University of Texas Law School “may not use race as a factor in law school admissions.” *Id.* at 935.

190. *Id.* at 944 (emphasis added).

interest under the Fourteenth Amendment."¹⁹⁰

The *Hopwood* decision suggests, in turn, that the goal of achieving a diverse marketplace of ideas on public university campuses may not be served by an admissions process that deliberately selects a racially diverse student body. Put more bluntly, the diversity preferences in admissions will not be allowed to support a diversity of ideas in the university marketplace.

In the fractured 1978 decision of *Regents of the University of California v. Bakke*¹⁹¹ suggesting that race may be considered in the admissions process but also that explicit racial quotas are unconstitutional, Justice Powell wrote that attainment of a diverse student body

is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.¹⁹²

In summary, one of the educational benefits of a diverse student body may be a diverse marketplace of ideas. It is possible that *Southworth* resuscitates and breathes new life into the idea of racial preferences in the admissions process. If diversity in the campus-marketplace is a privileged interest in *Southworth*, then it is not too much of a reach to promote diversity of ideas with diversity in admissions. If this is the case—that a link between diversity in the composition of the student body and the academic marketplace of ideas is made by courts in the future—then it truly would be ironic that it took a conservative-backed lawsuit to illustrate the connection. Not only would the right have supported a case that created precedent supporting mandatory fees that fund supposedly left-wing organizations, but it would have revived a rationale for supporting race-based preferences in university admissions.

V. CONCLUSION

Scott Southworth, as he put it, may not "worship the Supreme Court,"¹⁹³ but the decision that forever bears his name suggests that the Court, in fact, worships the marketplace of ideas, at least as that metaphor is applied to public institutions of higher education. From the perspective of at least one educator—the Author of this Article—this is an appropriate view.

The marketplace of ideas suggests a testing and challenging of ideas in order to gain a better understanding of what may or may not be the truth, however elusive that concept may be to define. This process of testing and challenging ideas readily comports with a common goal of higher education—teaching students to be critical thinkers.¹⁹⁴ Educators hope that students are able to test truth claims, to challenge information, and to think rationally and logically about the ideas that are

191. 438 U.S. 265 (1978).

192. *Id.* at 311-12.

193. Willing & Marklein, *supra* note 115 and accompanying text.

194. "Critical thinking is the reasoning we do in order to determine whether a claim is true." WILLIAM D. GRAY, THINKING CRITICALLY ABOUT NEW AGE IDEAS I (1991). See generally DONALD E.P. SMITH ET AL., CRITICAL THINKING: BUILDING THE BASICS (1998) (providing a guide for critical thinking strategies for students).

presented to them in the university environment and beyond in the "real" world.

The very antithesis of critical thinking is to reject an idea outright and *a priori*, without even allowing the idea to be expressed or fully developed. A narrow mind, not a tolerant or even a critical one, believes that some viewpoints are so illegitimate that they deserve not even to reach the marketplace of ideas where they can be either supported or shredded.¹⁹⁵ A narrow mind chooses censorship over what might be thought of as adversarial discourse.¹⁹⁶

The *Southworth* decision suggests that exposure to all ideas, not one narrow set of dogma, is a vital part of education. Justice Kennedy's words from the case about public universities stimulating "the whole universe of speech and ideas"¹⁹⁷ may never find their way on to the walls of college libraries, but they certainly are vital for preserving the integrity and freedom that comes with a public, well-rounded, and higher education in a democratic society. The true university, indeed, is a marketplace of ideas.

195. The United States Supreme Court has recognized, however, that some types of speech—child pornography and obscenity, for instance—are of either no value or of such low value that they fall outside the scope of First Amendment protection. See *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography"); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "without the protection of the First Amendment"); *Miller v. California*, 413 U.S. 15, 23 (1973) (holding that it has been "categorically settled" by the Court "that obscene material is unprotected by the First Amendment").

196. See Janet Farrell Smith, *A Critique of Adversarial Discourse: Gender as an Aspect of Cultural Difference*, in *DEFENDING DIVERSITY: CONTEMPORARY PHILOSOPHICAL PERSPECTIVES ON PLURALISM AND MULTICULTURALISM* 59, 59 (Lawrence Foster & Patricia Herzog eds., 1994) (writing that "[i]n adversarial discourse, speakers and writers oppose one another's claims through assertion and refutation, counterexample and disputation").

197. *Board of Regents v. Southworth*, 120 S. Ct. 1346, 1355 (2000).